BRB No. 92-2286

DAVID J. MOSS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CERES CORPORATION	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

John H. Klein (Rutter & Montagna), Norfolk, Virginia, for claimant.

Robert A. Rapaport (Knight, Dudley, Dezern & Clark), Norfolk, Virginia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (91-LHC-428) of Administrative Law Judge Richard K. Malamphy denying benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On November 22, 1989, claimant slipped and fell during the course of his employment as a dock foreman with employer. Dr. Habeeb performed arthroscopic knee surgery on January 17, 1990. He subsequently rated claimant's knee as having sustained a fifteen percent permanent partial impairment, pursuant to the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides)*, and opined that claimant is unable to return to his usual employment duties with employer as a result of his knee injury. Employer voluntarily provided medical benefits and paid compensation for temporary total disability to claimant from November 24, 1989, to August 2, 1990, *see* 33 U.S.C. §§907, 908(b), and permanent partial disability compensation for a fifteen percent impairment to claimant's right leg. 33 U.S.C. §908(c)(2).

On February 26, 1990, claimant complained to Dr. Habeeb of lower back pain. Claimant's treating physician for his back, Dr. Morales, diagnosed totally disabling discogenic back disease that

became symptomatic due to the November 22, 1989, work injury. Claimant thereafter sought additional compensation under the Act for either permanent total disability, 33 U.S.C. §908(a), or permanent partial disability, 33 U.S.C. §908(c)(21), caused by his back condition. Alternatively, claimant sought additional compensation to reflect his true loss of wage-earning capacity due to his work-related knee impairment.

In his Decision and Order, the administrative law judge determined that employer had rebutted the presumption of causation contained in Section 20(a) of the Act, 33 U.S.C. §920(a). The administrative law judge then found, after evaluating the record as a whole, that claimant's back condition is not related to his November 22, 1989, work injury. Thus, the administrative law judge concluded that claimant is not entitled to compensation for the alleged loss of wage-earning capacity caused by his back condition. Finally, the administrative law judge found, after reviewing the record, that no reasonable basis existed to assign a higher impairment rating to claimant's right knee than the 15 percent rating for which employer had previously tendered compensation.

On appeal, claimant challenges the administrative law judge's findings regarding the cause of his back condition and his entitlement to compensation for a loss of wage-earning capacity due to either the alleged work-related back injury or his work-related knee impairment. Employer responds, urging affirmance.

In establishing that an injury arises out of his employment, claimant is aided by the Section 20(a) presumption, which applies to the issue of whether an injury is causally related to the employee's employment activities. *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *Sam v. Loffland Brothers Co.*, 19 BRBS 228 (1987). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT) (5th Cir. 1990); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985).

Claimant initially contends that the administrative law judge, in concluding that a causal connection had not been established between the November 22, 1989, work incident and his back condition, erred in failing to resolve all doubtful questions of fact in his favor. Subsequent to the filing of claimant's appeal, however, the United States Supreme Court held that the "true doubt rule" does not apply to cases under the Longshore Act because it violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556(d), which requires that the party seeking the award bear the burden of persuasion. *Director, OWCP v. Greenwich Collieries*, ___ U.S. ___, 114 S.Ct. 2251, 28 BRBS 43 (CRT) (1994). Thus, we hold that the administrative law judge committed no error in failing to resolve all doubtful questions of fact in claimant's favor.

Next, claimant contends that the administrative law judge erred by not crediting the opinion of his treating physician, Dr. Morales, that his back condition was aggravated by the November 22, 1989 work incident. We disagree. In the instant case, the administrative law judge, after finding

that the Section 20(a) presumption had been rebutted, implicitly credited the opinion of Dr. Neff, who found no relationship between claimant's back condition and the November 22, 1989, work incident. Additionally, the administrative law judge noted that claimant initially denied injuring his back on the date of injury, he did not complain of back pain until February 1990, he failed to report any back complaints to Dr. Young, who conducted an independent medical examination in September 1990, and Dr. Habeeb's reports did not substantiate a causal connection. We hold that the administrative law judge committed no error in relying upon the testimony of Dr. Neff, rather than the testimony of Dr. Morales, in concluding that a causal relationship between claimant's back condition and the November 22, 1989, work incident had not been established. In adjudicating a claim, it is well-established that an administrative law judge is entitled to weigh the medical evidence and draw his own inferences from it, *see Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988), and he is not bound to accept the opinion or theory of any particular witness. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Thus, as the administrative law judge's credibility determinations are rational and within his authority as factfinder, and as substantial evidence supports the administrative law judge's ultimate finding, we affirm the administrative law judge's determination that claimant's back condition is not work-related. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

Lastly, claimant contends that the administrative law judge erred by failing to compensate his loss of wage-earning capacity caused by his work-related knee impairment. We disagree. Compensation for a permanent partial disability to a leg is determined pursuant to the schedule.[1] *See* 33 U.S.C. §908(c)(2), (19). For a schedule award, loss of wage-earning capacity is presumed; therefore, economic factors are not taken into consideration. *Burson v. T. Smith & Son, Inc.*, 22 BRBS 124, 127 (1989). Accordingly, whether claimant sustained a loss in wage-earning capacity is not relevant to claimant's entitlement to a schedule award for permanent partial disability to his leg. *See Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 277 n.17, 14 BRBS 363, 366-367 n.17 (1980). Accordingly, we affirm the administrative law judge's finding that claimant is entitled to compensation for a fifteen percent permanent partial knee disability, as that determination is supported by the impairment rating of Dr. Habeeb.

[1]We note that claimant concedes that his treating physician, Dr. Habeeb, approved the suitable alternate employment positions identified by employer. *See* Claimant's brief at 10.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge